Supreme Court, U.S.
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No. 01-136

In The

Supreme Court of the United States

MICHAEL KANE DUNKL and JERRY MAILHOT,

Petitioners,

v.

THE CITY OF SAN DIEGO and PADRES L.P.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. One of the petitioners was a sponsor of an initiative petition that is facially outside the power of the voters of the City of San Diego to enact. The existence of the initiative petition imperiled financing a voter approved capital project. The City of San Diego filed a declaratory relief action against the sponsors to establish that the petition was outside the power of the voters to enact. Does the First Amendment forbid such an action during the period in which an initiative's sponsors are gathering signatures to place the invalid initiative on the ballot?

2. The voter approved capital project involved a contract with Padres L.P., a non-governmental entity. Padres L.P. filed a declaratory relief action against the sponsors that was similar to the City of San Diego's action. The actions were consolidated. Does the First Amendment forbid a suit by a private party to declare a proposed initiative facially beyond the power of the voters to enact while the sponsors are gathering signatures to place it on the ballot?

PARTIES TO THE PROCEEDINGS

The City of San Diego objects to the petition's statement of parties to the proceedings. The initiative sponsors and defendants-appellants below were Michael Kane Dunkl and Philip Zoebisch. *See* Pet. at A-4, A-31, A-37, A-50. Jerry Mailhot, who is listed as a petitioner, is a stranger to the proceedings below.

The identification of the respondents is correct.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The City of San Diego ("City") urges that the petition for certiorari be denied. In this answer, "petitioner" refers to Michael Kane Dunkl, who is a petitioner and who was a party to the proceedings below. Philip Zoebisch, who was a party to the proceedings below, has not joined in the petition. Jerry Mailhot was not a party to the proceedings below, and accordingly the City does not recognize him as a petitioner.

OPINIONS BELOW

The City objects to the petition's listing of opinions below. Both the listing and petitioner's appendix omit the California Superior Court's order granting summary judgment and the judgment, which are required contents of the appendix. SUP. CT. R. 14(i)(i). Appendix A to this answer is the order and Appendix B is the judgment.

The City also objects to the appendix on the ground it omits the matters required by Supreme Court Rules 15(g)(i) and 15(i)(v). The petitioner's inability to supply a record complying with the rules is a reason to deny the petition.

STATEMENT OF THE CASE

A. The Voter Approved Ballpark and Redevelopment Project.

Voters of the City decided in 1998 to redevelop part of downtown San Diego. Consolidated Respondents' Appendix in Lieu of Clerk's Transcript[1] ["R.A."] at 442, 450-53. They included a new Major League Baseball park in the redevelopment. *Id.* They decided the City would invest $225,000,000 in the project, and they directed the City Council to proceed with the project. *Id.* at 451, 475. Proposition C was the means by which the voters adopted the redevelopment project. *Id.* at 442, 450-53. Proposition C directed the City and two related entities to execute the project through, among other things, a contract with Padres L.P. ("Padres"), the owner of the local Major League Baseball franchise. *Id.* The contract is titled "Memorandum of Understanding" and is often abbreviated "MOU." *Id.*

As one would expect for such an undertaking, the MOU contained contingencies. Among them, the City Council was required to select a method of financing the City's $225,000,000 investment and to make the investment if it found the financing could be accomplished "on terms reasonably acceptable to the City and on a fully tax-exempt basis. . . . " R.A. at 494, ¶ XXXIII. A. 1.

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[1] An appendix in lieu of clerk's transcript is a party-assembled record on appeal of the papers filed in the trial court. CAL. CT. R. 5.1. It is not unlike an appendix under FED. R. APP. P. 30 in circuits that permit filing of photocopies rather than printing.

Dunkl and Zoebisch, through the lawyer who represents Dunkl here, prepared a ballot initiative ("Proposed Initiative") to derail the redevelopment project. R.A. at 526-32. The Proposed Initiative would have substituted the voters for the City Council as the body to select a means of financing and to determine whether the terms of financing were reasonably acceptable. *Id.* at 528, § 2(a), at 529, § 3(d). Then, although it neither selected a means of financing nor identified financing terms, the Proposed Initiative purported to exercise the City Council's fact-finding power and to determine that the financing terms were unacceptable. It would have found that other conditions of the MOU failed as well. *Id.* at 529-30, § 4(a) & (b).

The Proposed Initiative as a potential ballot measure prevented financing the redevelopment project. R.A. at 196-99, 216-32. Because enactment of the Proposed Initiative, if it was within the voters' power to enact, would have prevented performance of the MOU, the Proposed Initiative created the appearance that there might be no project to generate revenue to pay the bonds. As a result, participants in the municipal bond market could not and would not price the tax-exempt bonds that need to be sold to finance the project. *Id.*

B. Summary of Proceedings Below.

The City sued Dunkl and Zoebisch in California Superior Court for declaratory relief that the Proposed Initiative was beyond the power of the voters to enact. Pet. at A-37-41. The City alleged that the Proposed Initiative was facially void because it proposed action that was

wholly within the administrative power of the City Council rather than within the legislative power shared by the City Council and the electorate. Pet. at A-38-39. The City also sought an injunction forbidding the proponents from filing the Proposed Initiative with the City Clerk for ballot certification. Pet. at A-39-40.

Padres simultaneously filed an action on the same grounds and on grounds not raised by the City. Pet. at A-50-57. The court coordinated the actions. R.A. at 646-47.

Because the Proposed Initiative threatened the project, the Superior Court specially set motions for summary judgment in which the City and Padres raised the administrative-legislative distinction. R.A. at 189-99, 647.

Dunkl and Zoebisch responded by moving to dismiss both actions under a California statute designed to terminate quickly "Strategic Lawsuits Against Public Participation." R.A. at 185-88; CAL. CIV. PROC. CODE § 425.16. The statute is commonly referred to by the acronym "SLAPP." A defendant invokes the statute by showing that the suit affects the exercise of constitutional rights of free speech or petition in connection with a public issue. CAL. CIV. PROC. CODE § 425.16(b)(1). To avoid dismissal of the action, the plaintiff then must show it will probably prevail on the claim. (*Id.*)

In the course of hearings on the SLAPP and summary judgment motions, Dunkl and Zoebisch conceded that the legislative or administrative characterization of the Proposed Initiative is a question of law to be decided by the court, R.A. at 1347:25-1348:3, and that the City's choice of

methods of financing its investment in the Ballpark Project is an administrative determination that is not subject to initiative, *id.* at 1404:27-1405:3. They also stated the Proposed Initiative was "dead" if the court declared it invalid. *Id.* at 1315:5-7, 1316:25; *see id.* at 980.

The court granted the City's motion for summary judgment. *Infra* at App. 1-5. It also found the SLAPP motions were moot because the City and Padres had prevailed on the merits. *Id.* at App. 5. The court entered judgment declaring the Proposed Initiative void because it would take only administrative acts. *Id.* at App. 6-7.

Dunkl and Zoebisch timely appealed. Both the judgments and the denial of the SLAPP motions were appealable under California law. CAL. CIV. PROC. CODE §§ 425.16(j) & 904.1(a)(1).

The California Court of Appeal affirmed. *City of San Diego v. Dunkl*, 103 Cal.Rptr.2d 269 (Cal. Ct. App. 2001). Dunkl and Zoebisch filed no petition for rehearing in the appellate court. The California Supreme Court denied their petition for review. Pet. at A-1.

C. Limited Constitutional Discussion Below

1. No Constitutional Issue in Superior Court.

The SLAPP statute applies to acts "in furtherance of a person's right of petition or free speech under the United States or California Constitution. . . . " CAL. CIV. PROC. CODE § 425.16(b), (e). In the trial court, Dunkl and Zoebisch therefore argued in general that their conduct in circulating an initiative petition was protected speech and petition activity. R.A. at 174-76, 187. The only evidence

they filed was a two-page declaration in which Zoebisch explained why he supported the Proposed Initiative and why he feared the cost of defending the suit. *Id.* at 183-84. Dunkl and Zoebisch's papers lacked any constitutional argument that a local government was barred from suing initiative proponents for a declaration that a circulating petition proposed a measure facially outside the power of the voters to enact. *Id.* at 174-87. Rather, they contended that under the City Charter, the City was required to sue its own clerk over the validity of a measure. *Id.* at 177-180.

The City did not contest whether circulating an initiative petition is, in general terms, protected speech and petition activity. R.A. at 883-901.

In their reply, Dunkl and Zoebisch again did not make any constitutional argument that a local government was barred from suing initiative proponents for a declaration that a circulating petition proposed a matter facially outside the power of the voters to enact. R.A. at 967-1016. They continued to contend that the City Charter and ordinances made the case unripe. *Id.* at 978-82. They contended for the first time that the court could not enjoin them from presenting the Proposed Initiative to the City Clerk, basing that argument on a California Supreme Court case limiting governmental agencies' right to sue for malicious prosecution. *Id.* at 1007 – 09. In connection with that argument, they admitted the jurisdiction of the court to enjoin presentation of an invalid initiative. *Id.* at 1012. They argued – without any authority, constitutional or otherwise – that "the court must take into account the need to balance the public interest in avoiding placing [an] invalid initiative on the ballot

against the danger that preelection litigation will chill the initiative process. . . . " *Id.* In support, Zoebisch filed a declaration stating that the litigation had impaired his effort to gather signatures but providing no facts about the cost of the process, the number of signatures gathered, or any other relevant point. *Id.* at 1019.

In opposition to summary judgment, Dunkl and Zoebisch repeated their argument against an injunction, R.A. at 1140, but made no constitutional argument against declaratory relief. *Id.* at 1131-41.

2. *No Constitutional Issue in Court of Appeal.*

In the California Court of Appeal, Dunkl and Zoebisch failed to argue that the City's suit was barred by a constitutional immunity. Instead, they repeated the uncontested point that their constitutional rights of speech and petition made the anti-SLAPP statute applicable to the City's action. Appellant's [sic] Opening Brief at 6-11. Based on that argument, they claimed that their SLAPP motion was not moot when the Superior Court decided the merits of the case against them. *Id.* Nowhere in arguing against the judgments did Dunkl and Zoebisch contend they were constitutionally immune from suit while they were circulating the initiative or afterward. *Id.* at pp. 12-39. The first hint of an argument for constitutional immunity from suit while circulating an initiative petition occurred in Dunkl and Zoebisch's reply brief, where it was presented with citations to California authority but without analysis to suggest it was anything other than a claim of error based on the fact that the City's complaint sought an injunction against filing the

Proposed Petition. Appellants' Reply Brief at 1. In short, it would have taken psychics, not judges, to predict that Dunkl would later raise the issues presented in his current petition.

The Court of Appeal did not discuss the issues presented in the petition for the obvious reason that they were not raised. See Pet. at A-3-30. Rather, the Court of Appeal took Dunkl and Zoebisch's procedural arguments for what they were – an attempt to extend California's prohibition of malicious prosecution suits by governmental agencies into a blanket prohibition of challenges to ballot measures before the voters vote. (Pet. at A-17.) Dunkl and Zoebisch filed no petition for rehearing in the California Court of Appeal.

3. California Supreme Court Petition.

In their petition for review to the California Supreme Court, Dunkl and Zoebisch finally stated the substance of the issues presented in Dunkl's petition here.

ARGUMENT

I.

OBJECTIONS TO STATEMENTS OF FACT AND LAW AND TO CONSIDERATION OF QUESTIONS PRESENTED

Supreme Court Rule 15.2 admonishes parties opposing a petition for writ of certiorari to address perceived misstatements of fact or law and to state their objections

to consideration of questions presented that do not go to jurisdiction. The objections are legion.

A. Misstatements of Fact and Law.

1. The petition is purportedly filed on behalf of Jerry Mailhot, who is not a party to the proceedings below.

2. The matters stated as fact in the first two paragraphs of the Statement of Facts and Procedural Issues are not in the record.

3. In the fourth paragraph of the Statement of Facts and Procedural Issues (Pet. at 4) and persistently thereafter, the petition states as purported fact that the City and Padres are engaged in a "joint business venture" or "partnership." These are legal conclusions, not facts. The issue of the nature of the relationship between the City and Padres was not adjudicated in this or any other case.

4. The matters stated as fact in the paragraph at the top of page 5 are not in the record.

5. The matters stated as fact in the top three paragraphs of page 11 are not in the record.

6. The matters stated as fact in the final paragraph of page 15 are not in the record.

7. The argument at pages 16 through 20 misstates California law. This point will be addressed in parts II.A.3 and II.B, *infra*.

B. Objections To Consideration of Issues

1. The issues presented by the petition were not presented to the California Superior Court.

2. Petitioner admitted that the issues presented in the petition were meritless when he admitted the jurisdiction of the court to enjoin presentation of an invalid initiative. R.A. at 1012.

3. The issues presented by the petition were not presented to the California Court of Appeal in Dunkl's opening brief on the merits or comprehensibly in any brief or argument.

4. The issues presented by the petition were not discussed by the California Court of Appeal in its decision. When the California Court of Appeal does not discuss an issue which a party desires to tender to the California Supreme Court for review, the party must raise the issue by petition for rehearing to the Court of Appeal. CAL. CT. R. 29(b)(2). The same is true if the party desires to disagree with or add to the facts as recited by the Court of Appeal. *Id.* As a result, the issues presented by the petition were never properly addressed to the California Supreme Court.

II.

THE PETITION FAILS TO MEET THE CRITERIA FOR CERTIORARI

A. Nothing Here Fits Within the Rule 10 Criteria for State Court Cases.

Supreme Court Rule 10 identifies the kinds of state court cases that may justify review on writ of certiorari. First, a state court of last resort may have created a conflict in authority on an important federal question. SUP. CT. R. 10(b). Second, a state court of last resort may have decided an important federal question that should be settled by the Supreme Court. SUP. CT. R. 10(c).

1. The Petition Raises Issues Not Decided Below.

The petition's first hurdle should be showing that the opinion below decided the questions raised in the petition. After all, a California appellate court opinion that does not consider a point is not precedent on that point. *Ginns v. Savage*, 393 P.2d 689, 691 n. 2 (Cal. 1964). A decision of California's intermediate appellate court, then, does not create a conflict or even take a position on an important federal question if it does not decide that question.

Dunkl's petition balks at the first hurdle. The Court of Appeal's decision does not discuss whether Dunkl had a federal constitutional immunity from suit while he was involved in circulating a petition. Rather, that court took Dunkl's arguments as presented in the briefs. The only apparent constitutional argument presented was whether

the California Supreme Court's application of the First Amendment to malicious prosecution suits barred any review of a ballot measure before the voters could vote on it. *See* Pet. at A-17. The issue Dunkl now presents – one focused exclusively on the timing of an action and the asserted burden of a suit during the circulation period – wasn't discussed.

2. No Conflict in Authority.

Indisputably, the decision below created no conflict of authority. The issues stated in the petition have never been decided by any court, state or federal.

3. No Important Federal Question.

If Dunkl had preserved and the courts had decided his issues below, his petition still would not present an important federal question. This case is not important in fact or in legal principle.

First, this case is nearly unique. There is no need for further judicial intervention. Dunkl argues the practical importance of the petition by selectively quoting from a Wall Street Journal editorial. Pet. at 2. That editorial says nothing about the chilling effect of prequalification suits on efforts to gather signatures; it urges judicial restraint in disqualifying initiatives on substantive grounds. Anonymous, *Ducking the Initiative*, THE WALL STREET JOURNAL, Sept. 6, 2000, at A26. Reported decisions, law review articles, and other reputable sources contain no evidence that state or local initiative processes are suffering undue

impact from suits to test whether proposed measures are within the power of voters to enact.

Contrary to the petition's rhetoric, California Supreme Court authority limits judicial invalidation of initiatives to those which, on their face, are outside the power of the voters to enact. *Senate v. Jones*, 988 P.2d 1089, 1095-96 (Cal. 1999). California courts are admonished not to intervene before an election when an initiative is challenged on account of its substantive invalidity. *Id.* Rather, challenges are limited to those provisions and principles of political law that describe the voters' reserved power – the single subject rule and the legislative acts rule being the primary examples. *Id.* This case not only involved the legislative acts rule, it involved a compelling public interest in immediate judicial intervention because the mere existence of the Proposed Initiative made it impossible for the City to complete a voter-approved project. R.A. at 196-99, 216-32.

Second, the petition presents no genuine federal question because the Constitution grants no right to citizens of a state to initiate legislation. The Constitution guarantees "to every state a republican form of government. . . . " U.S. CONST., art. IV, § 4. It does not guarantee that state constitutions or city charters must permit direct legislation by citizens. In the Supreme Court's latest decision about First Amendment constraints on regulation of advocacy related to initiatives, the Court was careful to describe Colorado as among the "States allowing ballot initiatives. . . . " *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 191 (1999). It cited with approval two cases holding that there is no First Amendment petition right of direct citizen legislation. *Id.* at 191-92, citing

Biddulph v. Mortham, 89 F.3d 1491, 1494, 1500-01 (11th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1977) and *Taxpayers United For Assessment Cuts v. Austin*, 994 F.2d 291, 293-94, 296-97 (6th Cir. 1993).

Because there is no federally guaranteed right to initiate legislation, the petition tries to connect this case with decisions involving restrictions on First Amendment speech about ballot initiatives. Legally, no such connection exists. What the state did here was declare that the Proposed Initiative was outside the power of the voters to enact; it took no action to impair advocacy of the views reflected in the Proposed Initiative or even to regulate how signatures may be gathered. The petition offers no reason why judicial declarations of invalidity fall outside the basic principle stated in *Buckley*: "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process. . . ." *Buckley*, 525 U.S. at 191. It is hard to imagine a less obtrusive protection of the integrity of the process than a judicial declaration whether the voters have the power to enact a measure.

Lacking a record of real-life problems and lacking a constitutional principle, the petition assumes that suits over the validity of initiatives at all times and in all ways overburden the advocacy related to direct legislation. Surely a petition should present some record of actual disruption of constitutionally protected activities when it argues the importance of an issue this way. But what this petition does is refute itself. The only practical consequence it can identify of a suit to declare an initiative outside the voters' reserved power is that the unlawful initiative does not reach the ballot. This does not chill

First Amendment advocacy on a public issue. Rather, Dunkl's concession in the trial court was correct – the court had jurisdiction, and whether to act is a fact-based matter, not a constitutional matter.

B. The Petition Misstates California Law About Preelection Review of Initiatives.

The petition contends California courts treat initiatives as second class legislation. Pet. at 16-20. Not so.

First, the petition is dead wrong to say that in "California voter initiatives are judicially reviewed as 'proposed' rather than 'enacted' legislation." Pet. at 16. Preelection review is limited to whether the measure is within the power of the voters to enact. *Senate v. Jones*, 988 P.2d at 1095-96.

From the initial false premise many errors follow. For example, the petition recites standard rules presuming the constitutionality of legislation and claims the courts fail to follow them in preelection review. Pet. at 16-17. This is wrong. Courts don't recite rules about constitutional validity in preelection review cases because the constitutionality of the measure if enacted is not at issue. Rather, the issue is whether the voters have the power to enact the measure.

C. Because Dunkl Does Not Challenge the Substance of the Declaratory Judgment and Zoebisch Dropped Out, the Petition Is Moot.

There is no conceivable point to litigating this case in the Supreme Court. The California Court of Appeal has

held that the Proposed Initiative was outside the power of the City's voters to enact. The petition does not challenge that solid state law ruling. Rather, the petition's core concept is that the *correct* determination of invalidity was premature. And the appropriateness of the timing of that correct determination is final beyond review as to Zoebisch, who did not join Dunkl's petition. The Supreme Court should not be a forum to litigate theoretical questions raised by only one of two theoretically affected parties.

CONCLUSION

A famous artist is quoted as saying of a Northern California city, "There's no there there." She accurately anticipated the contents of the petition for certiorari in this Southern California case.

Respectfully submitted,

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APPENDIX A:
ORDER GRANTING SUMMARY JUDGMENT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

CITY OF SAN DIEGO, a California chartered city, Plaintiff, v. MICHAEL KANE DUNKL, an individual; and PHILLIP ZOEBISCH, an individual, Defendants.	CASE NO.: GIC 741206 **ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFF CITY OF SAN DIEGO** (Filed March 17, 2000)

The motion of plaintiff City of San Diego ("City") for summary judgment came on for hearing on February 28, 2000 in Department 75 of the above-entitled court, Honorable Judith B. McConnell presiding. The City appeared by and through its counsel of record, City Attorney Casey G. Gwinn and Charles A. Bird of Luce, Forward, Hamilton & Scripps LLP. Defendants Michael Kane Dunkl and Phillip Zoebisch ("Defendants") appeared by and through their counsel of record Kent C. Wilson and J. Bruce Henderson. The Court read and considered the papers and records on file in this action and the argument of counsel, and good cause appearing therefor, it is hereby ORDERED:

1. City's unopposed request for judicial notice is granted. The request by Defendants for judicial notice of all contents of the court file is granted to the extent the

court takes judicial notice of the existence of such documents but not of the truth of the contents of such documents.

2. The court construes the declaration of Kent C. Wilson filed February 18, 2000, in opposition to the motions for summary judgment as a request for a continuance pursuant to Code of Civil Procedure section 437c, subdivision (h). This request is denied. Further discovery concerning the contractual issues is irrelevant because the court, in reaching its decision, does not deal with those issues. The remaining proposed discovery would not lead to controverting evidence because the sole issue raised by the motion for summary judgment is a legal issue.

3. The court declines to rule on specific evidentiary objections. The court disregards all evidence which is found to be incompetent or inadmissible. (*Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419.)

4. The motion for summary judgment is granted. There is no triable issue of material fact and no defense as to the validity of the initiative petition being circulated by defendants. The judicially noticed documents including Proposition C, the Memorandum of Understanding authorized by Proposition C, and Defendants' proposed initiative show that no triable issue of fact exists. Further, Defendants offered the same evidence.

5. The court notes that preelection review of an initiative is rarely undertaken by a court and should be done only where there are clear and compelling reasons to do so. As stated by our Court of Appeal in *Wiltshire v. Superior Court* (1985) 172 Cal.App.3d 296:

> The initiative power is " 'one of the most precious rights of our democratic process.' " Courts have repeatedly stressed it is more important to review challenges to initiative measures after an election rather than to disrupt the electoral process by preventing exercise of the people's right to vote. An exception to this judicial restraint arises on a showing the proposed initiative is beyond the power of the voters to adopt or is not legislative in character. (*Id.*, at p. 302 [citations omitted].)

6. As in *Wiltshire,* such a showing has been made. The proposed initiative falls within the exception, and preelection review is proper.

7. Furthermore, the California Supreme Court has observed that preelection review is appropriate when the challenge to an initiative is based upon a claim, as here, that the proposed measure may not be properly submitted to the voters because the measure is not legislative in character. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687

> The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure. (*Id.*, at p. 697.)

8. The initiative that is before the court reads, in part, as follows:

Section 2. Purposes of this Proposition

(A) This proposition is enacted to declare and determine on behalf of the City that as of November 2, 1999, certain contingencies and conditions subsequent affecting obligations of the City set forth in various provisions of the MOU have failed, are unsatisfied, or are defeated by non-performance.

(B) This proposition is enacted in order to terminate as of November 2, 1999, contingent obligations of the City subject to contingencies and conditions subsequent that this Proposition declares and determines have failed, are unsatisfied, or are defeated by non-performance.

9. The initiative goes on to make certain "findings and declarations" including that it is the people's intent "to carry out the purpose and intent of Proposition C and the MOU" and to " . . . exercise the discretion of the City as provided in the MOU. . . . " The factual findings contained in the proposed initiative are those typically made by a governing entity in an administrative decision. Such fact-finding in an initiative is impermissible.

10. The proposed initiative, in sum, makes only administrative decisions to undermine a measure previously adopted by the voters. If the proponents wish to speak out publicly, write letters, or in any other way attempt to influence the public and the City Council to take the action proposed here, they may do so, but they may not use the initiative process to express their concerns about any possible failings in the ballpark project unless they clearly do so by a legislative act.

11. In light of this ruling, Defendants' special motion to strike "SLAPP" suit is moot.

12. The City is directed to prepare a proposed judgment and submit it for the court's approval no later than March 13, 2000.

Dated: March 17, 2000

/s/ Judith D. McConnell
Judith D. McConnell
Judge of the Superior Court

APPROVED AS TO FORM:

March 13, 2000

Luce, Forward, Hamilton & Scripps LLP

By: /s/ Charles A. Bird
Charles A. Bird
Attorneys for Plaintiff the City of San Diego

March 13, 2000

/s/ Kent C. Wilson
Kent C. Wilson
Attorney Defendants Michael Kane Dunkl and Phillip Zoebisch

APPENDIX B:
JUDGMENT

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

CITY OF SAN DIEGO, a California chartered city, Plaintiff, v. MICHAEL KANE DUNKL, an individual; and PHILLIP ZOEBISCH, an individual, Defendants.	CASE NO.: GIC 741206 **DECLARATORY JUDGMENT FOR PLAINTIFF CITY OF SAN DIEGO** (Filed March 17, 2000)

The motion of plaintiff City of San Diego for summary judgment came on for hearing on February 28, 2000 in Department 75 of the above-entitled court, Honorable Judith D. McConnell presiding. The City of San Diego appeared by and through its counsel of record, City Attorney Casey G. Gwinn and Charles A. Bird of Luce, Forward, Hamilton & Scripps LLP. Defendants Michael Kane Dunkl and Phillip Zoebisch ("Defendants") appeared by and through their counsel of record Kent C. Wilson and J. Bruce Henderson. The Court read and considered the papers and records on file in this action and the argument of counsel, and good cause appearing therefor, it is hereby. ORDERED, ADJUDGED AND DECREED as follows:

1. The Initiative Petition signed by Defendants as proponents is a legally invalid initiative which is beyond the power of the voters to enact because it seeks to

undertake administrative rather than legislative action. A true and correct copy of the Initiative Petition is attached to this judgment as Exhibit A.

2. Each party shall bear his or its own costs and fees.

Dated: March 17, 2000

/s/ Judith D. McConnell
Judith D. McConnell
Judge of the Superior Court

APPROVED AS TO FORM:

March 13, 2000

Luce, Forward, Hamilton & Scripps LLP

By: /s/ Charles A. Bird
Charles A. Bird
Attorneys for Plaintiff the City of San Diego

March ___, 2000

/s/ (not approved)
Kent C. Wilson
Attorney Defendants
Michael Kane Dunkl and
Phillip Zoebisch

[Exhibit Omitted As Duplicative. Please See Petition At A-41 Through A-49.]